

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

JANUARY TERM, 1919.

No. 3250. **558**

HARRY ROLLER, APPELLANT,

vs.

WILLIAM E. WEIGLE AND THE G. L. HUSKE OPTICAL
COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED FEBRUARY 17, 1919.

PRINTED MARCH 20, 1919.

Court of Appeals of the District of Columbia.

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Court of Appeals of the District of Columbia.

No. 3250.

HARRY ROLLER, Appellant,

vs.

WILLIAM E. WEIGLE et al.

a Supreme Court of the District of Columbia.

Equity. No. 36266.

HARRY ROLLER, Plaintiff,

vs.

WILLIAM E. WEIGLE and the G. L. HUSKE OPTICAL COMPANY, a
Corporation, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1

Bill of Complaint.

Filed October 19, 1918.

In the Supreme Court of the District of Columbia, Holding a Court of
Equity.

Equity. #36266.

HARRY ROLLER, Plaintiff,

vs.

WILLIAM E. WEIGLE and the G. L. HUSKE OPTICAL COMPANY, a
Corporation, Defendants.

To the Honorable the Justices of the Supreme Court of the District
of Columbia, sitting in Equity:

Your Orator complaining, says:

I. That the Plaintiff is a citizen of the United States, and resides in the City of Baltimore, in the State of Maryland, and brings this suit in his own right.

II. That the Defendant, William E. Weigle is a citizen of the United States, and so far as your Orator is informed and believes, is a resident of the State of Maryland, and the defendant, the G. L. Huske Optical Company, is a corporation organized and existing under the laws of the District of Columbia, and is doing business therein, and said defendants are sued as hereinafter shown.

III. The Plaintiff charges that in January, 1918, and long prior thereto he had been for many years engaged in the optical business and is an experienced and successful optometrist.

2 That about the time last aforesaid the plaintiff learned that the business of the defendant, the G. L. Huske Optical Company, in the City of Washington, in the District of Columbia was being offered for sale in its entirety, owing to the ill-health of its managing owner, and stockholder, Mr. G. L. Huske, and he thereupon began correspondence with the said G. L. Huske, and made several trips to Washington with a view of purchasing the said business, at which times he conferred with the said Huske, and obtained sufficient information by observation and otherwise to cause him to determine to acquire the said business, but while engaged in the same line in the City of Baltimore, he was without the available capital necessary to consummate the transaction, and he therefore sought financial aid and assistance through a number of sources, one of them being the defendant, William E. Weigle, who, after investigation, promised and agreed to finance the proposition and instructed the plaintiff to proceed with negotiations, which he did, resulting in obtaining from the said G. L. Huske managing stockholder and owner of the said G. L. Huske Optical Company, an offer to sell the entire capital stock of said corporation at the inventory value of the stock and fixtures then in the establishment at 1429 H Street, N. W., Washington, D. C. That he communicated this offer to the said defendant, William E. Weigle, and after conferences between himself and the said William E. Weigle, together with one Max F. Schumacher, who was at that time to have been interested in the matter, it was determined to make a joint enterprise of the proposition, and in consideration of the fact that the plaintiff had produced the opportunity, and that he, the plaintiff, would personally give his time, attention, skill and experience to the management and conduct of the business, the said William E. Weigle agreed that he would advance the money necessary to consummate the transaction, and thereupon in pursuance of the understandings and agreements then and there had by and between the said parties, and the several conferences aforesaid, an agreement in writing was made and entered into on January 30th, 1918, whereby they agreed among themselves to purchase the entire capital stock of the defendant, the G. L. Huske Optical Company, said stock to be acquired by the respective parties to said agreement in the proportions of Fifty (50) shares to the said defendant, William E. Weigle; Forty (40) shares to the said plaintiff, Harry Roller, and Ten (10) shares to the said Max F. Schumacher. It was further agreed by and between the said parties under the terms of the agreement aforesaid that the price to be paid for said stock should be determined either by agreement between the owners and the said purchasers or ascertained by an inventory of the stock of the optical

goods and fixtures owned by the corporation, and that if necessary the defendant, William E. Weigle would loan to the plaintiff, Harry Roller and Max F. Schumacher the sum necessary to pay for their respective shares of stock, taking their promissory notes, with their stock as collateral, the indebtedness represented by said notes to be discharged out of the dividends accruing on the stock thus acquired by the said plaintiff, Harry Roller, and Max F. Schumacher. It was therein further agreed that the plaintiff, Harry Roller should

4 receive from the corporation a weekly drawing account of Fifty Dollars (\$50.00) as managing director, and the defendant, William E. Weigle, a weekly drawing account of Twenty-five Dollars (\$25.00) as supervising director, and that the said William E. Weigle should be entitled to receive from the corporation six per cent interest (6%) on the entire purchase price of the capital stock, and your Orator files herewith, marked Exhibit "A", a true copy of the said agreement in writing, which is made a part of this bill of complaint.

IV. The plaintiff further shows that thereafter, for the purpose of carrying said agreement into execution, and in pursuance thereof, the plaintiff made a deposit of One Thousand Dollars (\$1,000) with the said G. L. Huske as part of the consideration, and a payment on account of the purchase price of said stock, using the check of the defendant, William E. Weigle, for that purpose, and, acting in conjunction with the said G. L. Huske, the managing owner of the said G. L. Huske Optical Company, caused a full and complete inventory to be made in detail of the said stock and fixtures, when it was found that there was much more stock than had been supposed, and the value thereof was therefore in excess of the amount any of the parties estimated it would be,—although no definite figure had been set or fixed by the seller or by any of the parties to said agreement. Thereupon, at the instance and request of the said defendant, William E. Weigle, and without any consideration to the plaintiff moving, the plaintiff was induced to enter into a supplemental agreement dated and executed February 11, 1918, whereby the plaintiff, with the said

5 Max F. Schumacher and the said defendant, William E. Weigle, agreed that in the distribution of the stock to be acquired, the said William E. Weigle's interests should be increased to Sixty-six shares (66); the said Harry Roller's interests reduced to Thirty-three (33) shares, and the said Max F. Schumacher's interests reduced to one share which should be indorsed and delivered to the said William E. Weigle; "and that the agreement of January 30, 1918 shall in all respects continue as in said contract set forth," and your Orator files a true copy of the said supplemental agreement which is made part hereof and marked Exhibit "B."

V. The plaintiff further represents that since the making of the said last mentioned agreement, the defendant, William E. Weigle refuses to be bound by either of said agreements, and has determined to go on with the enterprise alone, and to exclude the plaintiff from any interest therein, and in pursuance of said determination has secretly acquired, either solely or jointly with others, in some manner which he conceals from the plaintiff, the control of the capital stock of the

said corporation, and is now in possession of all of said stock, or a majority thereof, and is conducting the business of the said Company at the place aforesaid, and has refused, and continues to refuse to permit the plaintiff to enter upon the fulfillment of his duties as provided in said agreement of January 30th, 1918, excluding him from the salary therein provided, depriving him of the allotment of stock provided by either agreement, denying him the necessary advances promised for the purchase of the stock, and refusing to disclose to him when, for what price and under what circumstances he acquired said capital stock and obtained possession of the said business and withholding all other rights to which the plaintiff is justly entitled.

6 VI. The plaintiff avers that he has ever been, and still is, and now tenders himself, ready and willing to perform every agreement and undertaking on his part to be performed, contained in the said agreement of January 30, 1918, and should the Court declare the agreement of February 11, 1918 to be a valid contract, the plaintiff, however, insisting that it is void for want of consideration, he tenders himself ready and willing to perform the agreements on his part to be performed contained in said last mentioned agreement.

VII. The plaintiff further charges that by the conduct and bad faith manifested by the said defendant, William E. Weigle, he is being wrongfully deprived of an opportunity to acquire a substantial interest in a profitable business, for even though the price finally fixed for the said stock was in excess of what had been originally estimated he had other sources outside of the said defendant, William E. Weigle from which he could have obtained the necessary financial assistance, and but for the action of the said defendant, William E. Weigle, he could have consummated the transaction in any event, even without the said defendant, William E. Weigle, and the latter has
7 taken an unfair and unjust advantage of the plaintiff in thus seeking to deprive him of substantial rights to which he is entitled under the circumstances as the producer of the business opportunity.

VIII. The plaintiff further avers that the stock of the said defendant corporation, the G. L. Huske Optical Company is not listed on any stock exchange and has no market value, its purchase and sale being a matter of individual and private contract only, and that there is no way of ascertaining in an action at law the damages sustained by him by reason of being deprived of the stock of the said G. L. Huske Optical Company, nor the loss in gains and profits sustained by being deprived of his status as a stockholder.

IX. That the interest of the said Max F. Schumacher was nominal and he has the right to become party plaintiff herein if he so desires. Wherefore, the plaintiff prays

First. That writs of subpoena issue directed to the defendants William E. Weigle and the G. L. Huske Optical Company, a corporation, commanding them to appear and make answer hereto, and to the interrogatories annexed hereto.

Second. That the agreement dated February 11, 1918 be declared void for want of consideration.

Third. That a decree be passed herein directing the defendant G. L. Huske Optical Co. to transfer on the books of the defendant company out of the stock standing in the name of the defendant,

8 William E. Weigle, or otherwise held by him, Forty (40) shares thereof to the plaintiff, the said Forty (40) shares when so transferred to be held by the said William E. Weigle in accordance with the terms of said agreement of January 30, 1918 as collateral security for the re-payment to the said William E. Weigle out of the dividends accruing on said stock of the amount or sum of money paid by the said William E. Weigle for said Forty shares (40) and in the decree so passed the plaintiff be declared to be the owner of said Forty (40) shares of stock as of the date of the acquisition thereof by the said William E. Weigle.

Fourth. That the said William E. Weigle be enjoined and restrained from voting, transferring or disposing of his stock in the said defendant corporation to the extent of Forty (40) shares thereof until the final hearing of this cause.

Fifth. That the said defendant, the G. L. Huske Optical Company, a corporation, be enjoined and restrained from taking any corporate action looking to the sale or transfer of its assets in bulk or the increase of the salaries of its officers, agents or employees until the final hearing of this cause.

Sixth. That the defendant, William E. Weigle, be required to account and make good to the plaintiff all damages accrued and to accrue to him by reason of his deprivation of the office and salary secured to him by the terms of said agreement of January 30, 1918 and that a money decree for the amount thereof be entered herein.

Seventh. And for such other and further relief as the nature of the case may require, and to the Court seems meet and proper.

9 And as in duty bound, etc.

HARRY ROLLER.

EUGENE A. JONES,
G. W. S. MUSGRAVE,
C. R. AHALT,
Attorneys for Plaintiff.

STATE OF MARYLAND,
City of Baltimore, ss:

Harry Roller, being duly sworn, on his oath says that he has read the foregoing bill of complaint by him subscribed, and knows the contents thereof, and that the facts therein stated of his personal knowledge are true, and those stated upon information and belief he believes to be true.

HARRY ROLLER.

Sworn to and subscribed before me this 16th day of July, A. D. 1918.

[SEAL.]

JAMES BIMESTEFER,
Notary Public.

Interrogatories to be Answered by the Defendant William E. Weigle.

* * * * * *

1. Is it not a fact that you have acquired, directly or indirectly, all, or the major portion of the capital stock of the G. L. Huske Optical Company?

2. How much of the said stock have you so acquired, and what have you paid, or agreed to pay for it?

3. State in detail all of the terms and conditions of any
 10 contract or agreement you have made or entered into with the owner or owners of the stock of said Company, whereby you have acquired the ownership or control thereof, and if in writing, annex a copy of said agreement or contract to your answer.

EXHIBIT "A."

This agreement, made this 30th day of January, in the year Nineteen Hundred and Eighteen, by and between William E. Weigle, Harry Roller and Max F. Schumacher, all of Baltimore City, in the state of Maryland,

Witnesseth, that whereas, the owners of the capital stock of the G. L. Huske Optical Company, a corporation, having an authorized capital of \$10,000, divided into 100 shares of the par value of \$100 per share, whose place of business is located at 1429 —H— Street, N. W., Washington, D. C., and offered to sell the entire capital stock of said corporation to the parties hereto, at a price to be ascertained either by agreement or by an inventory of the stock and fixtures belonging to said corporation. The said owners of said stock to deliver the corporation free and clear of all taxes, public dues and charges to the date of delivery of stock, and especially free and clear of any taxes by reason of the corporation income tax provided by Act of Congress; said price, when ascertained, to be paid in cash or paid cash and part notes as may be agreed upon. The said William E. Weigle is to receive 50 shares of said stock for which he is to pay one-half of the purchase price. The said Harry Roller is to receive 40 shares of
 11 said stock, for which he is to pay, and the said Max F. Schumacher is to receive ten shares, for which *which* he is to pay their respective proportions.

It is further understood and agreed between the parties that the said William E. Weigle, if necessary, is to loan to the said Roller and Schumacher, the sum necessary to pay for their respective shares of stock, and to take their respective notes, together with the stock as collateral.

It is further understood and agreed that from the earnings of the said corporation, and as an expense, charge interest at the rate of 6 per cent, payable quarterly on the said purchase price is to be paid by the said corporation to the said William E. Weigle.

It is also further understood and agreed that the said Harry Roller, as managing director of the corporation, shall receive a weekly drawing account of \$50.00, and the said William E. Weigle, as supervising

director, shall also receive a weekly drawing account of \$25.00. That after payment of all proper and necessary expenses and taxes, the net profits shall be paid to the respective shareholders in their proper proportions.

And it is expressly understood and agreed, that the said Harry Roller and Max F. Schumacher, will, at each dividend paying period, pay on account of their indebtedness the said William E. Weigle, to be credited on said note, the entire amount of dividends or profits received by them, and so continue from time to time until said indebtedness shall have been paid to said William E. Weigle, when said

note, together with the stock held as collateral, shall be returned to the respective parties entitled thereto.

It is further understood and agreed, when the parties hereto have been duly elected directors of the corporation, after the organization thereof, the said William E. Weigle will be elected President, the said Max F. Schumacher, Vice-President, the said Harry Roller, Secretary-Treasurer. That the salaries for their respective services as such, will be fixed at each meeting of the corporation before the dividends shall be declared.

In witness whereof, we have hereunto subscribed our names and affixed our seals the day and year first above written.

WILLIAM E. WEIGLE. [SEAL.]

HARRY ROLLER. [SEAL.]

MAX F. SCHUMACHER. [SEAL.]

Witness:

ALFRED J. CARR.

EXHIBIT "B."

This Supplemental Agreement, Made this 11th day of February, 1918, by and between William E. Weigle, Harry Roller, and Max Schumacher, all of Baltimore City, in the State of Maryland.

Whereas, on the 30th day of January, 1918, the parties hereto entered into a certain contract under which the capital stock of the G. L. Huske Optical Co, a corporation of the District of Columbia, located at 1429 H Street, N. W., Washington, D. C., was to be purchased as in said contract set forth.

And whereas, the purchase price was to be based upon the result of taking stock of said company, the same being estimated, approximately, at \$8,000.

And whereas, upon taking stock it is developed that the value thereof is much in excess of \$8,000.

And whereas, the said one hundred shares of stock of said corporation were to have been divided—50 shares to said William E. Weigle, 10 shares to said Max F. Schumacher and 40 shares to said Harry Roller.

And whereas, it necessitates the raising of additional capital to enable said purchase to be made.

Now, therefore, it is hereby covenanted and agreed that the distri-

bution of said stock as set forth in said agreement be annulled, and that the same shall be distributed as follows:

The said William E. Weigle, 63 shares, and to the said Harry Roller, 33 shares, and to the said Max F. Schumacher, one share, as qualifying for him as Director, (which said share, when issued, is to be indorsed in blank by said Max F. Schumacher, and delivered to the said William E. Weigle.)

And it is further agreed that said agreement of the 30th of January, 1918, shall in all respects, continue, as in said contract set forth.

Witness our hands and seals the day and year above written.

WILLIAM E. WEIGLE. [SEAL.]

HARRY ROLLER. [SEAL.]

MAX F. SCHUMACHER [SEAL.]

Test:

ALFRED J. CARR.

14

Motion to Dismiss.

Filed December 5, 1918.

* * * * *

Comes now the defendant, the G. L. Huske Optical Company, a corporation, by its attorneys, and moves the Court to dismiss the bill of complaint herein, and for grounds of this motion, among others, assigns the following:

1. The said bill of complaint does not set forth facts which if true entitle the plaintiff to the relief prayed for therein.

2. The bill of complaint sets forth facts which may constitute a controversy between the plaintiff, Harry Roller, and the defendant, William E. Weigle, to which this defendant as a corporation is not a party.

3. The said bill of complaint sets forth facts which are cognizable and entitle the plaintiff to relief if at all in the court of law in the suit against the defendant, William E. Weigle, or the defendant William E. Weigle and Max F. Schumacher, but which do not entitle the plaintiff to appeal to a court of equity for the relief prayed in the said bill.

WILSON, HUIDEKOPER & LESH,
Attorneys for the Defendant G. L. Huske Optical Co.

To Eugene A. Jones, J. W. S. Musgrave, and C. R. Ahalt, Esquires:

15 Please take notice that the foregoing motion has been set down and will be for hearing on Friday, December 13th, 1918.

WILSON, HUIDEKOPER & LESH,
Attorneys for G. L. Huske Optical Co.

Service of the foregoing motion and notice acknowledged this — day of December, A. D. 1918.

C. R. AHALT,
Attorneys for Plaintiff.

Motion to Strike Out the Motion to Dismiss, &c.

Filed December 10, 1918.

* * * * *

Comes now the plaintiff, by his attorney and moves to strike out the motion to dismiss filed herein by the Huske Optical Co. and grant a decree pro confesso because the grounds assigned therein are frivolous.

EUGENE A. JONES,
Attorney for Plaintiff.

Messrs. Wilson, Huidekoper & Lesh, Attorneys for defendants G. L. Huske Optical Co.:

Please take notice that I shall argue the above motion at the same time the motion to dismiss is argued.

EUGENE A. JONES,
Attorney for Plaintiff.

16

Motion to Dismiss by Henry Roller.

Filed December 20, 1918.

* * * * *

Comes now the defendant, William E. Weigle, by his attorneys, and moves the Court to dismiss the bill of complaint and for grounds of this motion, among others, assigns the following:

1. The said bill of complaint does not set forth facts which if true entitle the plaintiff to the relief prayed for therein.

2. The bill of complaint seeks the specific performance of a contract involving personal services and personal relations between the parties and executory in its nature, contrary to settled principles governing the granting of extraordinary relief of specific performance.

3. The bill of complaint seeks to enforce specifically against the defendant a different contract from that made by him.

4. The bill of complaint seeks to enforce specifically a contract of a nature of which specific performance will not be decreed.

5. The bill of complaint sets forth facts which if they entitle the plaintiff to relief are uncognizable only in a court of law.

WILSON, HUIDEKOPER & LESH,
Attorneys for Defendant William E. Weigle.

Wilson, Huidekoper & Lesh, Attys.

17

Order Dismissing Bill of Complaint.

Filed January 24, 1919.

* * * * *

This cause came on to be heard upon the motions to dismiss the bill of complaint filed by defendants, and upon the motion filed on

behalf of the plaintiff to strike out the motion to dismiss filed by the defendant corporation, and was argued by counsel, and upon consideration thereof, it is by the court, this 24th day of January, A. D. 1919—

Adjudged, ordered and decreed, that the said bill of complaint be and the same is hereby dismissed and judgment for the defendants with costs be and the same is hereby entered.

WILLIAM HITZ,
Justice.

From the foregoing decree the plaintiff notes an appeal to the Court of Appeals, and the bond for costs is fixed at \$100.00.

O. K. as to form.
EUGENE A. JONES.

Memorandum.

February 5, 1919.—Bond on appeal approved and filed.

18

Assignment of Errors.

Filed February 6, 1919.

* * * * *

The court erred in sustaining the defendants' motions to dismiss and entering a decree dismissing the bill.

EUGENE A. JONES,
Attorney for Plaintiff.

Order for Transcript of Record.

Filed February 6, 1919.

* * * * *

The Clerk of said Court will please prepare transcript of record on appeal & include therein the bill & exhibits, the motions to dismiss, & the final decree & assignment of errors.

EUGENE A. JONES,
Attorney for Plf.

19

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 18, both inclusive, to be a true and correct transcript of the record, ac-

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 36266 in Equity, wherein Harry Roller is Plaintiff and William E. Weigle, and the G. L. Huske Optical Company, a corporation, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of February, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*,
By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3250. Harry Roller, appellant, vs. William E. Weigle et al. Court of Appeals, District of Columbia. Filed Feb. 17, 1919. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR 14 1919

Henry C. Hodges
Deputy

**In the Court of Appeals of the
District of Columbia**

HARRY ROLLER, APPELLANT,

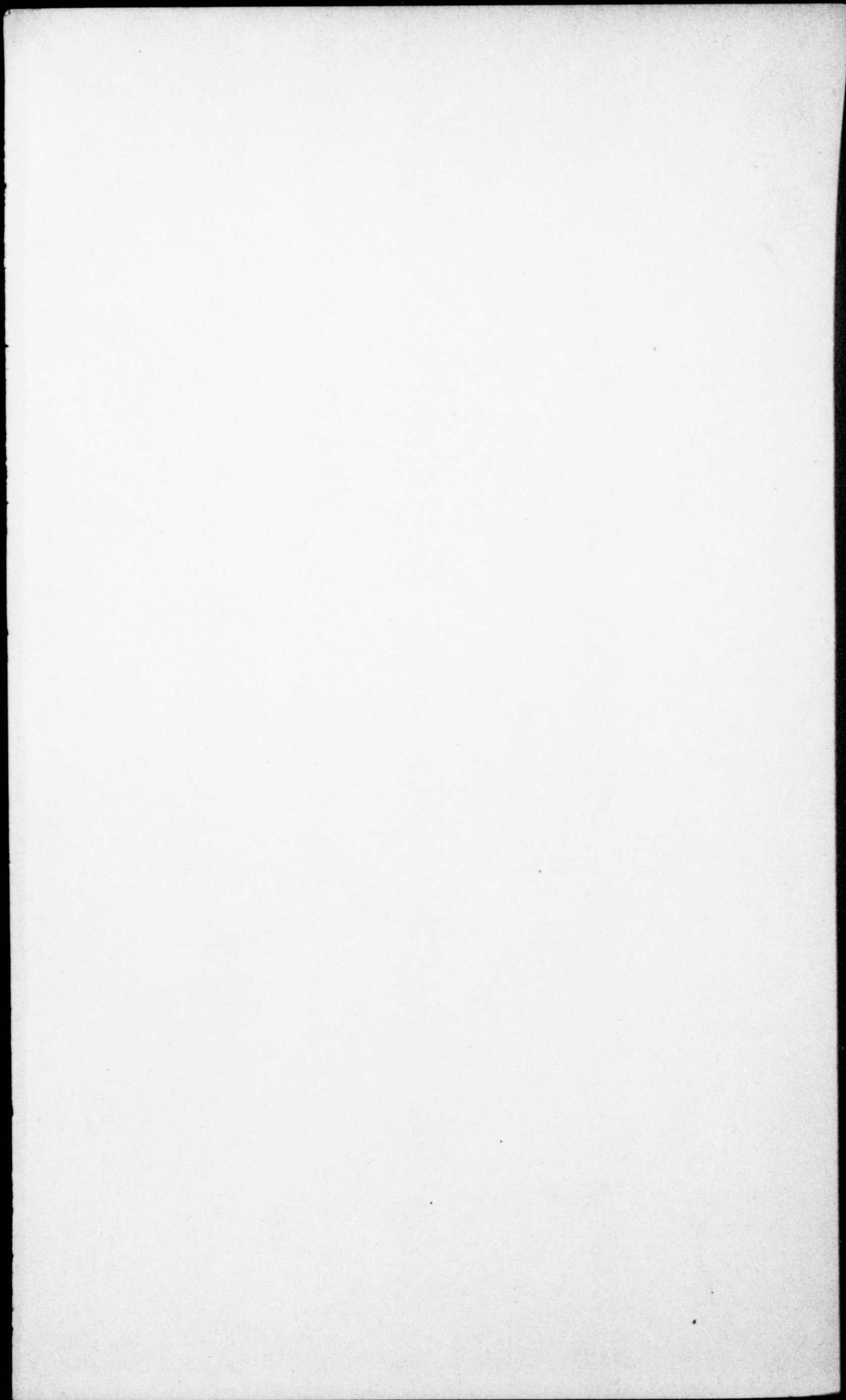
vs.

WILLIAM E. WEIGLE,
G. L. HUSKE OPTICAL CO.,
A CORPORATION, APPELLEES.

} January Term 1919.
No. 3,250.

BRIEF FOR APPELLANT

EUGENE A. JONES,
Attorney for Appellant.



IN THE COURT OF APPEALS OF THE DISTRICT
OF COLUMBIA.

HARRY ROLLER, APPELLANT,

vs.

WILLIAM E. WEIGLE,
G. L. HUSKE OPTICAL CO.,
A CORPORATION, APPELLEES.
January Term 1919.

No. 3,250.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

Appellant appeals from a decree dismissing, on defendant's motion, appellant's bill, for want of equity.

The bill prays (a) Discovery (b) Cancellation of an agreement (c) Specific transfer of certain stock having no market value (d) Injunction (e) Damages for breach of contract and (f) Accounting (R. pp. 4 & 5).

The facts alleged in the bill, and admitted by the motion to dismiss, are the following: That in January, 1919, appellant being an experienced and successful optometrist, learned of an "*opportunity*" to purchase at a sacrifice, the business of a going concern—The G. L. Huske Optical Company; being without available capital to finance the purchase, he interested Weigle, the appellee, who agreed to finance the proposition and instructed appellant to proceed with the negotiations for the purchase. Appellant accordingly negotiated with such effect that he obtained an

offer from the managing owner and stockholder of the Huske Optical Company, to sell the entire capital stock of the corporation at the inventory value of the stock and fixtures then in the establishment in Washington, D. C. That upon communicating this offer to Weigle it was determined to make a joint enterprise of the proposition between Roller the appellant, Weigle, and one Schumacher (a non-resident whose rights are not herein involved) *in consideration of the fact that Roller had produced the "opportunity,"* and would give his experience and attention to the business. The parties entered into a written contract signed by each of them whereby it was provided that Weigle should furnish the money, Roller and Schumacher their services and that the business should be acquired by the three parties to the agreement, in the proportions of 50 per cent to Weigle, 40 per cent to Roller and 10 per cent to Schumacher. In addition, Weigle was to receive 6 per cent interest on the amount advanced by him to purchase the business, Roller was to have a drawing account of \$50.00 weekly as managing director, and Weigle an additional \$25.00 weekly drawing account as supervising director. (R. p. 6.) Subsequently, and without any consideration the parties modified the agreement by increasing the interest of Weigle to 66 per cent, reducing the interest of Roller to 33 per cent and the interest of Schumacher to one per cent (R. p. 7). That thereafter appellee Weigle breached the contract by purchasing the business on his own account, excluding Roller and Schumacher from any interest therein, taking possession of the business, and refusing to permit them any participation in the fruits of the enterprise. This in substance states the contents of the bill (R. pp. 1-5). The bill contains the proper tender on the part of plaintiff of readiness and willingness to perform his contract (Par. 6, R. p. 4).

Upon the theory that the bill seeks specific performance of a contract for personal services, and that the plaintiff's remedy, if any, is at law, the court below dismissed the bill. (R. p. 9.)

ASSIGNMENT OF ERROR.

The Court erred in dismissing the bill.

ARGUMENT.

The bill does not seek specific performance of a contract for personal services; no such prayer is found in the bill; it is manifestly a bill by one co-adventurer against another for Discovery and Accounting. The paramount consideration moving to Weigle for his entry into the adventure was the production by Roller of the "*opportunity*" to acquire the business; a bargain—so considered by the parties; Roller's industry, coupled with his experience, "*produced the opportunity*"; an opportunity to take over the business of a going concern and make money of it. This "*opportunity*" was the birth of the joint enterprise produced by Roller's genius alone. It was this "*opportunity*" which was to be capitalized and developed. The parties to the contract had determined to develop and speculate in an "*opportunity*," discovered and promoted by Roller alone dedicated by him under the joint agreement for the benefit of his co-adventureres. This was the basis and subject matter of the joint enterprise; as much so as if it were a mining option, an oil lease, the profits of a logging boom, exclusive rights to "film a village beauty" or any other of the innumerable speculations that have formed the subject matter of joint business speculations and enterprise and been determined by the courts to be the proper subject matter of contract.

This *subject matter of the contract* has been delivered over by Roller to his co-adventurers and appropriated by Weigle to his own exclusive enjoyment.

The provisions in the contract relative to Roller's personal services are mere incidents to the main enterprise, Shall he be damnified because Weigle refuses to accept the service? Roller has fully performed his part of the contract by delivering to his co-adventurers his "*opportunity*," and tendering his willingness to perform the service called for in the contract if permitted to do so by Weigle. The contract is no longer executory so far as Roller is concerned; he has executed it so far as he has been permitted to do so.

True, Weigle has not received the benefit of Roller's service; but neither has he been compelled to pay Roller's "drawing account" of \$50.00 per week. By "drawing account," we understand, not salary—but a sum charged against Roller's dividends on the stock promised him. If Roller's right to his stock depends not alone on the "production of the opportunity," but also upon the performance of service, can he be deprived of his stock because he is not permitted to perform the service? May Weigle take advantage of his own wrong? Appellees have never contended that the contract lacks any essential to its validity. It contains a lawful subject matter, a valid consideration, competent parties, and its breach is not denied; is plaintiff remediless?

The court below said the remedy is at law, we submit it is not for the following reasons:

Suppose Roller brought an action for the breach of the contract; the breaches assigned would be the following:

- a. Weigle's refusal to transfer to appellant 40 per cent of the stock mentioned in the contract, said stock having no "market value."
- b. Weigle's refusal to permit Roller the personal supervision of the business.

c. Weigle's refusal to permit Roller to draw the sum of \$50.00 per week.

In an action on these breaches the jury might be able to ascertain the damages arising by reason of the third breach, but how could the value of non-listed, non-marketable stock or the dividends thereafter accruing, be ascertained by them? And even if there were evidence of value, how could they shape their verdict so as to give Weigle a lien for the amount the stock cost him payable out of the dividends on the stock, as provided in the contract? How could the jury ascertain any of the facts essential to a verdict on that phase of the case without first having a discovery from the defendant as prayed in the first paragraph of the bill? What form of verdict and judgment at law will at once adjudicate and settle all the rights of the parties, as a decree in equity will? At best, a verdict for damages only would deprive appellant of his status as an officer and stockholder in the corporation.

POINTS AND AUTHORITIES.

1. THE PARTIES EMBARKED UPON A "JOINT ADVENTURE" AND THEIR RIGHTS, LIABILITIES, AND REMEDIES BETWEEN THEMSELVES ARE LIKE THOSE OF PARTNERS.

Vol. 15 R. C. L. p. 500, Section 2.

Senneff vs. Healy 155 Iowa 82.

Driver vs. Brunemer, 40 App. D. C. 105.

Barry vs. Colburn 65 W. Va. 493.

Ann Cas. 17 p. 1018.

The principle is applied in the following cases:

Jones vs. Kinney 146 Wis. 130 (Purchase of oil lease).

Chambers vs. Mitnacht, 23 S. D. 449.

Lind vs. Weber, 36 Nev. 623 (Purchase of mining lands.)

Barry vs. Bernayo, 141 S. W. 993.

Irvine vs. Campbell, 121 Minn. 192 (Purchase of lands).

Botsford vs. Van Riper, 110 Pac. 705 (Agreement to purchase entire stock of corporation).

In the last cited case it was held that the suggestion of the scheme by one party and his promise to aid the adventure by advice and counsel constituted sufficient consideration for the agreement, the court saying "the fact that it required large sums of money to carry the deal through, counsel seem to believe, vitiates the consideration of the agreement alleged, for the reason it is admitted respondents were practically penniless. We fail to see any merit in this contention."

The property acquired by one member of a joint adventure in pursuance of the joint adventure should be impressed with a trust for the benefit of all the adventures.

Irvine vs. Campbell, 121 Minn. 192.

Where a person acquired all the information relating to an enterprise, and in confidence conveyed the information to other persons with a view to securing their efforts in a joint enterprise with himself, it was held that they were disqualified to acquire interests which were antagonistic to the first adventurer.

Goss vs. Lannin, 152 N. W. 45.

Where the profits to be accounted for consist of corporate stock, the other members are entitled to stock and are not restricted to a money judgment.

Botsford vs. Van Riper, *supra*.

Neither party can withdraw from such a contract because it is no longer advantageous to him.

Bane vs. Dow, 80 Wash. 631.
Goss vs. Lannin, 152 N. W. 45.
Nevins vs. Hecksher, 155 N. Y. S. 230.

2. THE REMEDY UPON A CONTRACT OF "JOINT ADVENTURE" IS IN EQUITY.

Barnitt vs. Smith Powers, 184 Fed. 139.
Dedallah vs. Williams, 15 Cal. App. 738.
Maxwell vs. McWilliams, 145 Ill. App. 155.
Edwards vs. Johnson, 72 S. E. 638.
Smith vs. Corbett, 16 West L. Rep. (B. C.) 257.
Bellevue vs. Baltimore Trust Co., 214 Fed. 817.
Note: 50 L. R. A. (N. S.) 1046.

The corporation is a necessary party.

Kendig vs. Dean, 97 U. S. 423.

Schumacher is not a necessary party.

Brady vs. Erlanger, 149 N. Y. S. 929.

3. EQUITY HAS JURISDICTION TO COMPEL A TRANSFER OF STOCK.

O'Donnell vs. Chamberlain, 36 Colo. 395.
Butler vs. Wright, 186 N. Y. 259.
Baumhoff vs. St. Louis, 205 Mo. 248.
Hills vs. McMunn, 232 Ill. 488.
Kendig vs. Dean, 97 U. S. 423.

4. TO DEPRIVE EQUITY OF JURISDICTION THE REMEDY AT LAW MUST BE AS PLAIN AND ADEQUATE AS PRACTICAL AND EFFICIENT TO THE ENDS OF JUSTICE AND ITS PROMPT ADMINISTRATION AS THE REMEDY IN EQUITY.

Boyce vs. Grundy, 3 Peters U. S. 215.
Watson vs. Sutherland, S. Wall U. S. 74.

Oelrichs vs. Spain, 15 Wall U. S. 211.
 Tyler vs. Savage, 143 U. S. 79.

It is axiomatic that "a court of equity ought to do justice completely and not by halves," and the fact that it may be called upon to pass on strictly legal questions interwoven with equitable rights does not deprive it of jurisdiction.

Kilbourn vs. Sunderland, 130 U. S. 514.
 Williamson vs. Monroe, 101 Fed. 322.
 Reynes vs. Dumont, 130 U. S. 364.
 Union Central vs. Phillips, 102 Fed. 19.

The principle of these cases is embodied by the Supreme Court of the United States in its Rule 23 now in force, which provides "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

This rule was under consideration in the case of Wright vs. Barnard (233 Federal 329) on a motion to transfer the cause to the law side of the court; in denying the motion the court said as follows:

"With the exception of the balance of salary claimed by the complainant, I am not prepared to hold that the subject matter of the suit as disclosed by the bill is not properly cognizable in equity. Unless the law furnishes a complete and adequate remedy, jurisdiction in equity exists. (Boyce's Exrs. vs. Grundy, 3. Pat. 210; Watson vs. Sunderland, 5 Wall. 74; Insurance Co. vs. Bailey, 13 Wall, 616; Lewis vs. Cocks, 23 Wall, 466; Drexel vs. Berney, 122 U. S. 214; Allen vs. Hanks, 136 U. S. 300.) In Lewis vs. Cocks it was said 'To bar equitable relief the legal remedy must be equally effectual with the equitable remedy as to all the rights of the complainant.' In Kilbourn vs. Sunderland, 130 U. S. 514, it was said, 'The jurisdiction in equity at-

taches unless the legal remedy both in respect to the final relief, and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.' The dominant factor in determining the question of jurisdiction is to be found in the general scope and nature of the case as made by the bill, and a decision on the question of the balance of salary is but an incident of a suit properly on the equity side of the court."

Respectfully submitted,

EUGENE A. JONES,
Attorney for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 8 - 1919

Henry W. Hodges

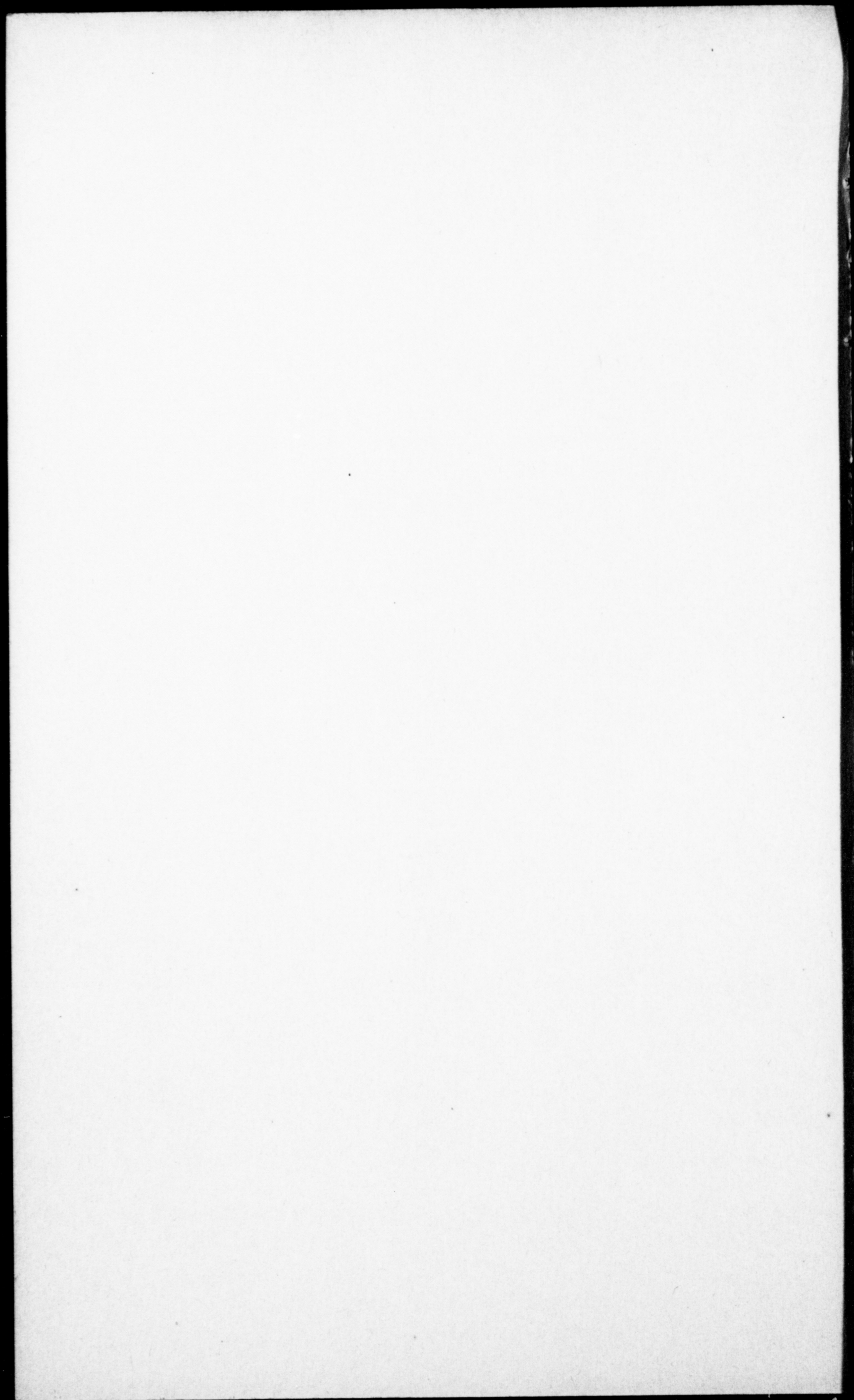
In the Court of Appeals
OF THE DISTRICT OF COLUMBIA.
OCTOBER TERM, 1919.

No. 3250.

HARRY ROLLER, APPELLANT,
vs.
WILLIAM E. WEIGLE AND THE G. L. HUSKE
OPTICAL COMPANY, A CORPORATION.

BRIEF FOR APPELLEES.

PAUL E. LESH,
Attorney for Appellees.
WILSON, HUIDEKOPER AND LESH,
of Counsel.



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BRIEF FOR APPELLEES.

Statement.

The decision of the court below may be supported by sound common sense applied to the facts of the case as well as by technical rules of law. A restatement of the facts with proper emphasis upon those considered important by the defendants is therefore desirable.

The plaintiff relies upon a contract made with the defendant and another concerning which his counsel says in the brief for the appellant (p. 4):

“It contains a lawful subject-matter, a valid consideration, competent parties, and its breach is not denied; is plaintiff remediless?”

Of course the plaintiff has not been adjudged to be “remediless” merely because specific performance has been denied, but perhaps the most conspicuous infirmity of the plaintiff’s appeal to the court is that the breach

of the contract is not only "not denied" but it is not asserted.

The plaintiff's bill represents an attempt, apparently nine months after a proposed joint project was abandoned (at what time and how the plaintiff does not choose to reveal to the court), to revive the terms under which the project was to be undertaken and apply them in derogation or destruction of the rights subsequently acquired by one of the proposed joint adventurers, and either to force upon an unwilling defendant close business relations with and personal services of the plaintiff or to make a new contract for the parties whereby the plaintiff and the court select a portion of the original contracts for enforcement.

The facts which the plaintiff alleges in his bill are these:

That in January, 1918, and prior thereto, G. L. Huske owned and managed an optical business in a store at 1429 H Street (the Southern Building), this city. His business was incorporated under the name of G. L. Huske Optical Company, but it was so much his personal business that his ill health compelled him to offer it for sale at a sacrifice.

The plaintiff, Mr. Roller, learned of this offer and presented it to the defendant, Mr. Weigle, and to one Max F. Schumacher, not a party to this suit.

The three of them entered into an agreement which is plaintiff's Exhibit A (Rec., p. 6), whereby they settled between themselves the terms upon which they proposed to buy the business, by acquiring all of the capital stock of the G. L. Huske Optical Company, of which Weigle was to pay for and receive 50 per cent, Roller 40 per cent and Schumacher 10 per cent. All of the funds, however, were to be advanced by Weigle, who was to receive the promissory notes of Roller and Schumacher for the irrespective shares with their stock

as collateral. The payment of the interest and principal of these notes out of the expected profits of the enterprise was provided for in the agreement, and when the indebtedness should be paid the stock of Roller and Schumacher was to be distributed to them.

It was agreed that the three contractors should be the directors of the corporation, that Mr. Weigle should be president, that Mr. Schumacher should be vice-president, and that Mr. Roller should be secretary-treasurer; it was also agreed that Mr. Roller should be the manager of the business and should have a weekly "drawing account" of \$50.00; that Mr. Weigle as supervising director should have a "drawing account" of \$25.00.

There is no question but that Mr. Weigle's principal contribution to this proposed purchase was that he was to bear the financial burden of it. It was equally plain, but needs to be emphasized because the appellant seeks to elide it, that Mr. Roller's principal contribution to the enterprise was to be that of skilled personal service. The plaintiff says in his bill (Rec., pp. 2-4):

Par. III. "The plaintiff . . . had been for many years engaged in the optical business and is an experienced and successful optometrist. . . .

" . . . and in consideration of the fact that the plaintiff had produced the opportunity and that he, the plaintiff, would personally give his time, attention, skill and experience to the management and conduct of the business, the said William E. Weigle agreed that he would advance the money," etc. . . .

"Harry Roller should receive from the corporation a weekly drawing account of fifty dollars (\$50.00) as managing director."

Par. V. "Weigle . . . continues to refuse to permit the plaintiff to enter upon the fulfill-

ment of his duties as provided in said agreement of January 30th, 1918, excluding him from the salary therein provided, depriving him of the allotment of stock," etc.

The offer of sale from Mr. Huske was at the inventory value of the stock and fixtures. The plaintiff, Roller, made a deposit of \$1,000.00 with Mr. Huske, the money being advanced by Mr. Weigle (Rec., p. 3), and an inventory was made of the stock and fixtures, which developed that its value was much in excess of the amount any of the parties estimated it would be.

Thereupon a supplemental agreement was entered into between the three proposed purchasers, by which Mr. Weigle's interest was increased to 66 per cent, and Roller's and Schumacher's interests reduced to 33 per cent and 1 per cent respectively, the old agreement remaining otherwise unchanged. This supplemental agreement is not material to appellees' view of the case except as Mr. Roller's attitude toward it evidences his willingness to stand on or off of an agreement as it may serve his interest.

It appears, however, from this agreement (Exhibit B, Rec., p. 7), that at the time it was made the total inventory value had apparently not yet been determined, for it was stated to be merely "much in excess of \$8,000.00"

The averments of the bill reciting the subsequently occurring facts require a critical examination, not alone to determine exactly what is averred, but also to determine the significance of the omissions.

Nowhere does it appear what happened then, immediately after February 11th, 1918.

It is not averred that the inventory was completed, or that the three contractors were called upon or given opportunity to perform by Mr. Huske, or that Mr. Weigle was called upon to perform by his co-contractors.

It is not averred that Roller or Schumacher then tendered themselves ready and willing to perform.

It is intimated, or one might infer, that when the inventory was finally completed, the inventory value was found to be in excess of either the original or revised estimates, for the plaintiff says in paragraph VII, in complaining of his lost opportunity, that, "even though the price finally fixed for the said stock was in excess of what had been originally estimated, he had other means of obtaining the necessary money or could have consummated the transaction."

It is averred that at sometime prior to the filing of the bill (October 19th, 1918), by phraseology which carefully avoids any averment of what happened in January or February, 1918, that Weigle "refuses" to be bound by these agreements and "has secretly acquired" the capital stock and "is conducting" the business and "has refused" to permit the plaintiff to enter upon his duties as manager (Rec., pp. 3-4).

Mr. Roller also avers that he "now tenders himself" ready and willing to perform, not that he ever tendered himself before, though he does aver (what must have been a secret willingness) that he has been heretofore ever willing to perform (Rec., p. 4).

It is merely averred that subsequent to the making of the contracts and the making of an appraisement to determine the purchase price, Mr. Weigle has himself purchased the business, and is now conducting it.

This is the situation, without more explanation of how the situation came about, of which Mr. Roller complains by his bill filed on October 19th, 1918.

If the situation which would be created if the prayers of his bill were now granted, is considered, it becomes difficult to believe that he really desires that result. Laying aside the fact that Mr. Schumacher's participation would be necessary in order to carry out the con-

tracts of January and February, 1918, the carrying out of those contracts would make Mr. Roller now a joint purchaser with Mr. Weigle upon his credit of a small business, requiring the personal supervision and services of its owners, of which he would be the manager, and Mr. Weigle the supervising director with a majority of the stock, an intolerable situation from a business point of view and one which would likely lead to the application of one party or the other for a receiver before the first day's business should be done.

The plaintiff's statement and argument emphasize, to the exclusion of all other elements in the case, this thought—that the plaintiff produced the *opportunity* by bringing the sale of the Huske business to the attention of Mr. Weigle and Mr. Schumacher, and that the plaintiff should receive his agreed compensation for producing the opportunity. The vice of this argument is that the agreement for compensation to the plaintiff was an agreement which contemplated and required not alone the production of the opportunity (which was then an accomplished fact, a past consideration), but the participation by the plaintiff and by Schumacher in the proposed joint undertaking by the giving of notes and by personal services, for the indivisible whole of which the plaintiff was to receive certain benefits. The plaintiff can not, standing upon his agreement, claim a severable or separate compensation or reward for producing the *opportunity*. If he rendered services in this regard, somewhat as a broker, and is entitled to a compensation therefor, clearly that compensation is the reasonable value of the services, to be recovered in an appropriate suit which does not seek specific enforcement of contracts which were principally founded upon other consideration.

In such a suit, if he alleges and proves that he rendered services under such circumstances as entitled

him to a compensation, he would recover, but such a case is not before the court, however industriously the appellant seeks to depart in his brief from the theory of his bill.

ARGUMENT.

The argument on behalf of the defendants appellees may conveniently be made in support of these propositions:

1. A breach of the contracts by the defendants is not alleged.
 2. The bill is essentially one for specific performance.
 3. Specific performance of the contracts in question can not be herein compelled.
 4. The cases cited by the appellant are inapplicable.
- Taking up these propositions in the above order—

I.

A Breach of the Contracts by the Defendants Is Not Alleged.

The failure of the plaintiff to state that it was the defendants or either of them whose default resulted in the abandonment of the proposed purchase by Messrs. Weigle, Roller and Schumacher, has already been pointed out (*supra*, p. 4). If this failure had been an accidental omission in the drafting of the bill, it would have been cured by amendment in the court below, for this contention was there made, as here. In the memorandum filed with the court below by the defendants, the following paragraph appears:

“At best, it is a bill by a proposed joint adventurer, to procure his agreed share of the fruits

of an adventure agreed to be made but never proceeded with. In an appropriate action at law for breach of this contract, the issue would be—Was the joint project abandoned by mutual consent or wrongfully? The lack of any allegation of contemporaneous tender of performance by the plaintiff (Par. VI) or any contemporaneous refusal by the defendant, is significant in this connection.”

Inasmuch as the plaintiff elected to stand upon his bill as drawn, the court must conclude that he expects to prevail without proving that he made mention, at the time their joint negotiations failed, or any time prior to the filing of his bill, that he desired to proceed in the joint undertaking.

II.

The Bill Is Essentially One for Specific Performance.

The appellant in his brief says (p. 3), “The bill does not seek specific performance of a contract for personal services; no such prayer is found in the bill.” The appellant’s present theory is that the bill is for “discovery and accounting” (Id., p. 3).

The bill is certainly not a technical bill of discovery. It is a bill seeking *relief*, and such *discovery* as is prayed is merely incidental to the relief.

It is a fundamental proposition in equity that where a bill is filed for relief and for discovery as incidental thereto, if the court decides that there is no ground for equitable relief, no discovery can be had. It is hardly necessary to do more than state this proposition, but it will be found supported in Story’s Equity Pleadings, paragraph 312; also in *Taylor vs. Taylor*, 8 Howard, 183. If this were not the rule, every controversy in which the plaintiff desired a discovery of facts from the defendant would be drawn into equity.

A recent case, in which the claim was for timber cut from the land of the plaintiff, and in which the bill contained averments of fraud, conspiracy and violation of trust, and which sought discovery and accounting, but in which the court found, on demurrer, that there was no ground for an appeal to a court of equity, was that of *United States vs. Bitter Root Co.*, 200 U. S., 451. Mr. Justice Peckham, said (p. 478):

"It is also argued that a court of equity has jurisdiction in such a case as this on the ground of an accounting. We do not think that this is any such case as gives a court of equity jurisdiction because of an accounting being necessary. There are no accounts between the parties. . . . Whatever books, if any, defendant may have kept, showing the amount and location of the timber cut and its value, can be perfectly well obtained by an inspection of these books in an action at law. No discovery is alleged to be necessary in aid of an action at law, although the bill shows that several such actions have in fact been commenced. The facts averred do not show jurisdiction for the general purpose of discovery."

In the case at bar the principal prayers are the third and sixth, the other prayers being for incidental relief. The third prayer is for the transfer of forty shares of stock to Roller; the sixth prayer is for money damages for the deprivation of the office and salary which Roller was to have.

Obviously the claim for money in lieu of the office and salary would no be the subject of a suit in equity, unless equity had jurisdiction for some other purpose.

The first prayer, it is true, is for process to compel the answer of the defendants to the bill and to the interrogatories addressed to the defendant Weigle. The plaintiff thus seeks to obtain from Weigle a statement of his

alleged ownership in the stock of the G. L. Huske Optical Company, and to compel him to disclose the terms and conditions upon which he acquired it and, by reference to the other prayers, eventually to account to the plaintiff for the plaintiff's alleged part ownership in the corporation.

But unless the plaintiff is entitled to a share of what Weigle acquired, he is not entitled to an accounting from Weigle, nor to interrogate Weigle as to what otherwise is Weigle's individual property.

The fourth and fifth prayers likewise are aimed at the preservation for the plaintiff of his claimed interest in the stock of the corporation.

The plaintiff's right to all of the relief he seeks, excepting his claim to damages for loss of salary, is therefore dependent upon the establishment of his claim to forty shares or a portion of the stock in the corporation acquired by Weigle. His only claim to the forty shares is under the contracts of January 30th and February 11th, 1918, and is dependent for its establishment upon the specific enforcement of those contracts.

If therefore the contracts under which the plaintiff seeks to have this stock transferred to him are such that a court of equity will not specifically enforce them in this suit, this action can not be maintained.

III.

The Specific Performance of the Contracts in Question Can Not Be Herein Compelled.

There are two objections to enforcing specifically the contracts of January 30th and February 11th.

The first is that the carrying out of these contracts involves the participation of a third party, Schumacher, who is not a party to this cause and whose attitude toward them is not alleged; and the other is that the contracts necessarily involve personal relations and

personal services, particularly those of the plaintiff Roller, and are therefore not enforceable against him and, upon the ground of lack of mutuality, not enforceable by him.

As to the first of these objections, it appears upon the face of the bill that participation by Schumacher is essential to the carrying out of the agreements and is one of the considerations for the transfer of stock to the plaintiff.

In paragraph III it is alleged—

“After conferences between himself and the said William E. Weigle, together with one Max F. Schumacher, who was at that time to have been interested in the matter, it was determined to make a joint enterprise of the proposition” (Rec., p. 2).

The joint adventurers, according to the allegation, were to be Harry Roller, William E. Weigle, and Max F. Schumacher.

The agreement of January 30th, 1918, Exhibit A to the bill, provides that Weigle was to loan Roller and Schumacher the sums necessary to pay—

“for their respective shares of stock, and to take *their respective notes*, together with the stock as collateral” (Rec., p. 6).

The parties to this agreement were Roller, Weigle and Schumacher. The agreement further provided:

“It is further understood and agreed that when the parties hereto have been duly elected directors of the corporation, after the organization thereof, the said William E. Weigle shall be elected president, the said Max F. Schumacher, vice-president, and the said Harry Roller, secretary-treasurer” (Rec., p. 7).

The agreement of February 11th, 1918 (which the plaintiff alleges is void but is willing to stand upon if neces-

sary), Exhibit B to the bill, provides for the reduction of Schumacher's interest to one share, \$100—

“as qualifying for him as director (which said share, when issued, is to be endorsed in blank by said Max F. Schumacher and delivered to the said William E. Weigle)” (Rec., p. 8).

Mr. Schumacher's participation in the enterprise was, however, to be the same, excepting for the amount of his interest, for it was provided:

“and it is further agreed that said agreement of the 30th of January, 1918, shall in all respects continue as in said contract set forth” (Rec., p. 8).

If, therefore, the contracts were attempted to be specifically enforced in this suit, the court would in reality be making for Roller and Weigle a new contract which would modify the old one by omitting Schumacher. Schumacher's presence upon the board of directors may have been an indispensable condition to Weigle's consent to the undertaking. The dropping out of one out of three joint contractors can hardly be regarded as an immaterial detail, even supposing that the court had the power to judge for the parties whether they would have made the contract as so altered.

As to the second of the objections above mentioned—the objection upon the ground that a contract for personal services or in consideration of personal services not yet rendered will not be specifically enforced—it has already been attempted in the statement portion of this brief to point out to the court that a consideration moving from Roller in this matter was his undertaking to be the manager of the business. His contribution was to be experience and skill. It would not matter if this were not the principal consideration moving from Roller; it would be sufficient if it were a part of the consideration; but it happens in the present

case that the only present or future consideration moving from him, except his agreement to be director and manager, was his agreement to give his note (to be repaid out of profits) to the financial backer of the proposed purchase, Mr. Weigle; and no one with a knowledge of the motives which ordinarily actuate men in making business contracts could suppose that Mr. Weigle was moved by a desire to get rid of a portion of his stock and sell it to Roller upon terms so obviously favorable to Roller, except as a means of securing his skilled services in the conduct of the business.

The observation of the court in *Deitz vs. Stephenson*, 51 Oregon, 596 (hereinafter more fully quoted), is true of this case. That court said:

"It has been alleged by defendant Stephenson and established by his testimony, that the controlling cause on his part for entering into the contract was the necessity of securing a competent, experienced and honest manager to conduct the hotel, and was not merely a desire on his part to dispose of his stock."

In the case at bar this controlling fact appears from the allegations of the bill itself (*supra*, p. 3).

The appellee submits that the following propositions are well established by the authorities:

Specific performance is not a matter of right but a matter of sound judicial discretion.

Specific performance will not be decreed as to part of an agreement, severing that part from the remainder, unless by the nature of the contract that part is severable.

Specific performance will not be enforced of a part of an agreement unless the court can enforce the entire agreement.

Specific performance will not be enforced at the suit of a plaintiff who has not yet performed, though he tenders himself willing to perform, if the plaintiff in

consideration of the defendant's undertaking was to perform personal services.

Equity will not force personal relations or personal services upon unwilling parties.

There is a note in 6 L. R. A. (N. S.), beginning at page 1115, of which a portion beginning at page 1123 might well be incorporated as a whole in this brief. From this note we quote the following:

III. General rule that equity will not specifically enforce contracts of service.

The general rule applicable to all classes of cases except those reviewed in *infra* V, VIII, b, is that a contract of service will not be specifically enforced, either directly by means of a decree directing the defendant to perform it, or by an injunction restraining him from violating it. (Citing numerous cases.)

(b) Illustrative cases in which the applicant for relief was the employee.

In *Brett vs. East India and L. Shipping Co.*, 2 Hem. & M., 404, Page Wood, V. C. (afterward Lord Chancellor Hatherley), refused specific performance of an agreement to employ plaintiff as a ship broker, one of the stipulations being that the plaintiff's name should appear jointly with that of the secretary of the defendant's company in all advertisements of the company.

Nor does he entitle himself to relief by showing that he has paid money for the privilege of being appointed to the place in question. *Healy vs. Allen*, 38 La. Ann., 867 (sexton of cemetery, by whom money had been paid in consideration of certain incidental advantages accruing to him in his trade as marble cutter).

Nor is an employee of a corporation who holds a considerable portion of the stock in any better position than one who holds no interest. *Stewart*

vs. Pierce, 116 Iowa, 733, 89 N. W., 234 (court refused to order continuance of the plaintiff's employment after the expiration of his contract, although he owned a half interest, and was a party to a contract with the owners of the remaining stock, which provided for equal control of the stock, and equal services).

See also, *Reid Ice Cream Co. vs. Stephens*, 62 Ill. App., 334, where a part of an agreement made by a corporation in taking over the plaintiff's business was that he was to receive a monthly salary for services to be rendered

IV. Rationale of this rule.

In *De Francesco vs. Barnum*, L. R. 45 Ch. Div., 438, Fry, L. J., said: "For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the courts are bound to be jealous lest they should turn contracts of service into contracts of slavery; and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner."

Many other cases quoted in this exhaustive note show the reason of the rule to be one which the court should invoke in the present case.

In the case of *Cooper vs. Pena*, 21 Cal., 404, the suit was for the specific performance of a contract to convey land to the plaintiff in consideration of services to be rendered by him in the survey of property of the de-

fendant and another, including the land in question, to establish a boundary. The court said (p. 411):

"So far as the agreement is unperformed the plaintiff can not be compelled to perform it on his part, for equity will not enforce a contract for personal services, but leave the party to his remedy at law. In respect of the remedy, therefore, there is no mutuality, and it is universally admitted that equity will not enforce a contract where the party asking its enforcement can not himself be compelled to perform it. The contract must be just and equal in its provisions, and the subject-matter must be such that equity can take jurisdiction of it and compel performance by both of the parties. The remedy must be mutual as well as the obligation, and where the contract is of such a nature that it can not be specifically enforced as to one of the parties, equity will not enforce it against the other. . . . It is a settled principle, that the specific performance of a contract is not a matter of course, but rests in the sound discretion of the court, upon a view of all the circumstances, and before the court will act, it must be satisfied that the contract is reasonable and equal in its operation.

We have already stated that the plaintiff can not be compelled to complete the services which he agreed to perform, and the fact that he has offered to complete them is not equivalent to actual performance. The rejection of the offer by the defendant excuses the performance as a condition precedent, but it does not release the plaintiff from his obligation to perform, as long as he insists upon the agreement. As this is an obligation which the court can not enforce, there is no principle which would justify it in enforcing the obligation on the other side; and the only course is to decline to interfere, and leave the plaintiff to his remedy for damages. It is proper to remark that there is no assurance that the offer could be carried out, if there is a third person

to be consulted, he might refuse to act in the matter, he might not agree to a satisfactory partition. This is an insuperable objection and no relief looking to the completion of the services in fact, even if the court had the power, so far as the plaintiff is concerned, to enter a compulsory order in that respect. Besides, the services are of such a character that no court would compel their acceptance as they are confidential in their nature and involve in their performance the exercise of discretionary authority."

In *Deitz vs. Stephenson*, 51 Oregon, 597, the suit was for the specific performance of an agreement to transfer to the plaintiff capital stock in a hotel company in consideration of the agreement of the plaintiff and his wife to take charge of the hotel.

The court said:

"Most of the testimony in the record was taken on this issue, but it is not necessary that we should examine into it to determine the issue on that point, for, assuming that the specific performance of the contract might be decreed by a court of equity, if this contract called for only the sale of shares of stock for a money consideration, yet we find that there is joined with that an obligation on the part of the plaintiff to furnish the personal services of himself and wife in the management of the hotel at a salary of \$125 per month, of which \$65 was to be applied on the purchase price of the stock. . . . Here is mutuality of obligation, but is there also mutuality of remedy? Specific performance will not be enforced against one party if it can not be so enforced by the other. The remedy must be mutual (Citing cases and also *Pomeroy*, *Specific Performance*, par. 162-163, par. 310).

"It has been alleged by defendant Stephenson and established by his testimony, that the controlling cause on his part for entering into the contract was the necessity of securing a compe-

tent, experienced and honest manager to conduct the hotel, and was not merely a desire on his part to dispose of his stock. This becomes, then, a material consideration of the sale, and having no power to compel plaintiff to specific performance of that part of his contract according to the intent of the parties, in favor of defendant, a court of equity should not enforce it in other respects against the latter. Nor is a mere offer to perform or tender of performance of personal services, the performance of which could not be compelled in equity, sufficient to relieve the case of the lack of mutuality as to remedy (citing cases)."

In *Pantages vs. Grauman*, 191 Fed., 317, 112 C. C. A., 61, a suit in equity, the court said:

"The honorable circuit court sustained the demurrers and dismissed the bills of complaint on the ground of a want of mutuality in remedy upon the agreement which forms the basis of the suit. While this court has not confined its investigation to the one ground considered, we have concluded that it is determinative of the cause. . . .

"Further than this, it will prove of assistance to outline what the agreement is in its analysis. It is as follows:

"(1) Grauman agrees to sell and transfer to Pantages 10 shares, being 50 per cent of the capital stock of (an amusement company).

"(2) Pantages agrees to pay \$50,000 for said stock as follows . . . and \$37,500 to be retained out of the net earnings or profits of his stock.

"(3) Pantages agrees that the amusement company shall be entitled to have the first call on the vaudeville act or performance (of a certain kind) for the term of 10 years from the date of the opening of the theater. . . .

"Now it is urged with much emphasis that the agreement is severable; that the principle and

essential conditions thereof consist in the first two stipulations, namely, that Grauman agrees to sell the stock and Pantages to pay the specific consideration therefor, and that all the other stipulations are merely subsidiary to the main agreement, and ought to be so treated in determining whether specific performance should be decreed.

"The initial and central purpose of the parties being as previously observed, to secure a play-house and to manage and conduct the same as a business venture for the profits obtainable, it was most natural that provisions should be made for obtaining theatrical attractions. . . .

"The legal inquiry remains, which is whether the agreement is susceptible of enforcement of specific performance on the part of Pantages to require the deposit for transfer of the stock on the part of the Graumans, one or both of them. It is a fundamental principle that specific performance of a contract will not be decreed unless it can be rendered applicable upon both parties. In other words, the remedy must be mutual; otherwise, it can not be invoked (*Marble Company vs. Ripley*, 10 Wall., 339, and other cases)."

"Furthermore, equity will not interpose to enforce a part of a contract, unless that part is clearly severable from the remainder, its purpose being to do complete justice (citing cases)."

See *Marble Company vs. Ripley*, 10 Wall., 339, 335, 358, where the Supreme Court said:

"Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous, they involve skill, personal labor and cultivated judgment. It is, in effect, a personal contract to deliver marble of a certain kind, and in blocks of a kind, that the court is incapable of determining whether they accord with the contract or not. The agree-

ment being for a perpetual supply of marble, no decree the court can make will end a controversy. . . . And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder."

See, also, *Stubblefield vs. Stubblefield*, 32 Appeals, D. C., 535, 541, to the effect that specific performance is not a matter of absolute right, and *Lipscomb vs. Watrous*, 3 Appeals, D. C., 1, 6, 7, where this court said:

"In such case, the familiar principle applies, that a court of equity will never decree a specific performance where the remedy is not mutual, or one party only is bound by the agreement. . . . It is laid down as settled doctrine by the Supreme Court of the United States, in the case of *Marble Company vs. Ripley*, 10 Wall., 339, 359, 'that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.' "

See *Waterman on the Specific Performance of Contracts*, Chap. VI, paragraphs 196 to 199, particularly paragraph 198 and the latter part of paragraph 191.

IV.

Cases Cited by Appellant Are Inapplicable.

A number of the cases cited by the appellant are in support of propositions which the appellees must concede to be entirely sound, but which are not determinative of this case.

It is conceded that equity has jurisdiction to compel the transfer of corporate stock which can not be duplicated in the open market, and that the plaintiff has by appropriate averment brought the stock in question in

this case within that rule. If, therefore, the court had before it a specifically enforceable contract for the transfer of this stock to the plaintiff, it would have jurisdiction. This proposition, however, is no answer to the objections to the enforcement of the contract upon which appellees rely.

Similarly it is conceded, but for similar reasons contended to be inapplicable, that to deprive equity of jurisdiction the remedy at law must be as plain and adequate as the remedy in equity.

It is also conceded that if equity had jurisdiction for any purpose in this case (which would be for the specific enforcement of the stock contracts), it would proceed to adjudicate the entire controversy, even though the purely legal right to salary is one of the claims of the plaintiff. This concession of course does not include the proposition that a right of discovery, which could be procured by summoning the defendant as a witness in a suit at law, may be made the basis of drawing this controversy into equity under the guise of a bill for discovery. (See, *supra*, p. 8.)

The other doctrines sought to be invoked by the appellant relate to what are known as "joint adventures."

When these cases are examined, however, they will be found to involve executed undertakings.

The plaintiff does not cite any authority (and could not cite any sound authority) to the effect that where one of two joint adventurers declines to go ahead with the project, and the project involves for its complete execution personal services on the part of the other, a court of equity can compel the unwilling adventurer to proceed.

Typical of these cases, and if one may judge from the oral argument of the court below, one much relied upon by the appellant, is *Brady vs. Erlanger*, 149 N. Y. Supp., 929, which will be found upon examination to be a case in which the joint adventure had been accomplished.

Many of these cases involve the familiar "grub stake" doctrine, where the financial backers of the adventurer, whom they have "staked," enforce their agreed interest in what the adventurer has discovered but concealed. Such a case is that of *Lind vs. Webber*, 36 Nev., 623, 134 Pac., 461, 50 L. R. A. (N. S.), 1046, and also *Botsford vs. Van Riper*, 33 Nev., 156, 110 Pac., 705, both of which are twice cited, and the latter of which was much relied upon in the court below, by the present appellant.

Though the Nevada court in these cases states quite strongly the doctrine of the "grub stake" cases, none of the questions which the appellees have argued in this case were there involved.

The same Nevada court, in *Turley vs. Thomas*, 31 Nev., 181, had before it a case in which the agreement sought to be enforced was for the transfer to the plaintiff of shares of capital stock in consideration of personal services on the part of the plaintiff.

In a long and elaborate opinion, the court stated and supported by numerous authorities the doctrine that if personal services which remain unperformed are the consideration of the defendant's undertaking, specific performance will not be enforced. It was found, however, that the plaintiff in the *Turley* case had fully performed, and it was only for this reason that a decree for the transfer of the stock in question was entered.

The appellant cites the case of *Goss vs. Lannin*, 152 N. W., 45, to the effect that where one person acquires information relating to an enterprise and in confidence informs others, with the view to securing their efforts in a joint enterprise with himself, the others are disqualified to acquire interests in the subject-matter antagonistic to the first adventurer, and also to the effect that neither party may withdraw from a joint adventure because it is no longer advantageous to him. This case will be found upon examination to be one in

which the plaintiff sought an accounting, and in which he and some of the defendants had, over a long period of time, contemplated together engaging in an enterprise, which the plaintiff had brought to the attention of these defendants. These defendants subsequently procured capital from their co-defendants, who were not parties to the original arrangement with the plaintiff, and proceeded with the enterprise. The defendants were held not accountable to the plaintiff. The court found that the plaintiff at no time did more than promote the idea of the enterprise without either putting up the money with which to carry it forward or procuring others to do so, and that the plaintiff had no claim upon the defendants who did procure the capital and subsequently go forward with the matter, though the subject-matter of the defendants' enterprise was the same as had been contemplated by the plaintiff and the defendants.

It is respectfully submitted that there has been cited to the court no authority which furnishes a precedent for compelling a defendant to perform a contract in specie where the plaintiff's consideration or undertaking is the performance by him of personal, confidential and skilled services, which services have not yet been performed, whether or not the plaintiff states that he is at the time he appeals to the court willing to perform them.

Conclusion.

It is respectfully submitted that the plaintiff has not stated a case which if proven would entitle him to relief in this cause, and that the judgment of the court below in dismissing the bill was correct, and should be affirmed.

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of Counsel.